The Limits of International Law
Abigail Moncrieff, '06

Professor Eric A. Posner's recent book, The Limits of International Law, might be better entitled Yet More Proof That Nothing is Immune From Economic Analysis: A Chicago Theory of International Law. No doubt Professor Posner would have chosen such a proud U of C title but for the fact that his coauthor, Professor Jack L. Goldsmith, is now teaching at Harvard. The book develops and applies a rational choice theory of international law, describing why international rules arise and why states follow them. In their own words, Posner and Goldsmith's theory is that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power." I recently asked Professor Posner a few questions about the book.

What motivated you to develop this theory of international law? What part or parts of existing theories do you find most inadequate or objectionable?

Several years ago, my scholarship focused on the relationship between law and social norms. One of the puzzles that interested me was why people often cooperate even when the law doesn't compel them to, or isn't adequately enforced. At the same time, Jack Goldsmith was writing about international law, and through conversation we realized that a similar puzzle exists at the international level: why do states comply with international law when there is no sanction for violating it?

The international law literature at that time did not provide a satisfactory answer to this question; indeed, most legal scholars ignored it. The political science literature on international relations did try to answer the more general question of how states cooperate, and how they are able to construct international institutions. But the literature did not address international law as such, so there seemed to be a gap that needed filling.

Your theory assumes that the state is the relevant agent. Why is the focus on the state—instead of the individual head-of-state, for example—a necessary and/or useful assumption?

This assumption is a methodological convenience. It would be more satisfying to have a theory of international law that had, as some people say, "microfoundations" in individual behavior. But to do this, one would need a theory about how individuals' interests determined state behavior, and although there is a lot of work on this topic, none of it is really satisfactory. So it seemed appropriate to try to simplify, and start at the level with the state, with some simple assumptions about what states seek to maximize (security, wealth, and so forth).

Your theory describes foreign relations decision-making as a balancing of interests, by which a state will violate international law as long as the violation is cost-benefit justified from the state's self-interested perspective. The cost of noncompliance, by your account, consists of the possibility of retaliation and, maybe, reputational loss. What factors go into the benefits?

There are all kinds of possible benefits. The U.S. violated international law when it intervened in Kosovo. What were the benefits? Maybe it feared that Serbian aggression was destabilizing Europe, and this posed a threat (however remote) to American security; or maybe the benefit consisted in the reduction of human rights violations.

To make the previous question more concrete: Let's pretend that there's an autocrat whom the United Nations Security Council has ordered to disarm. As the autocrat knows, a powerful enemy believes that he has weapons in violation of the order, but he also knows that the belief is false, that he has no weapons. He further knows that the enemy's polity has recently developed a stronger-than-usual interest in deterring threats to its security, making the enemy more likely than usual to "retaliate" for security-related violations of international law. Assuming that the autocrat has reasonable information about the enemy's desire and capacity to retaliate, are there interests you can imagine that might make it rational for him to obstruct UN weapons inspectors—to prevent the enemy from discovering that he does not, in fact, have weapons?
I'm no expert on Iraq, but from what I read in the newspapers, it sounds as though Saddam Hussein feared that if he revealed that he did not have WMDs, he would appear weak both to internal enemies and external enemies like Iran. It is also possible that he was fooled by his own yes men, who feared that they would end up in Abu Ghraib if Saddam learned that he no longer had WMDs.

One of the key insights of your theory is that states have neither intrinsic desire nor moral obligation to comply with international law. Would it not, however, be consistent with a rational choice model to believe that states discount the benefits of noncompliance based on a sense that noncompliance is intrinsically bad or morally corrupt?

One could imagine that states have such a preference, and it would not be inconsistent with rational choice theory, but theories that assume what they are trying to explain are not very useful. I want to understand why states comply with international law, and assuming that states have a preference for doing so is not to answer the question. In addition, as I can't see any moral reason for complying with international law, it would be surprising if leaders of state thought they had such an obligation.

For the future of the international legal system: Is there any area of international law (e.g. trade, human rights, war... coastal fishing vessels...) that you think would benefit from an executive authority? In other words, is there an area of international law in which it would be good to have an enforcement mechanism realigning states' interests to increase compliance? If so, which area of international law do you think would benefit most and why? If not, why not?

I don't think it's feasible. If it were feasible, the question might be: would we want a world government if it were possible? There is an interesting literature on optimal size of government. Simplifying greatly, a world government would be able to do good things that now require cumbersome and often unsuccessful cooperation among 191 states (for example, reduction of global pollution or of trade barriers); but it would also be less sensitive to local variations in people's valuations and interests. Perhaps, some kind of federal system would work, like the one developed for the United States a little more than 200 years ago.

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